TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~450~~ 49

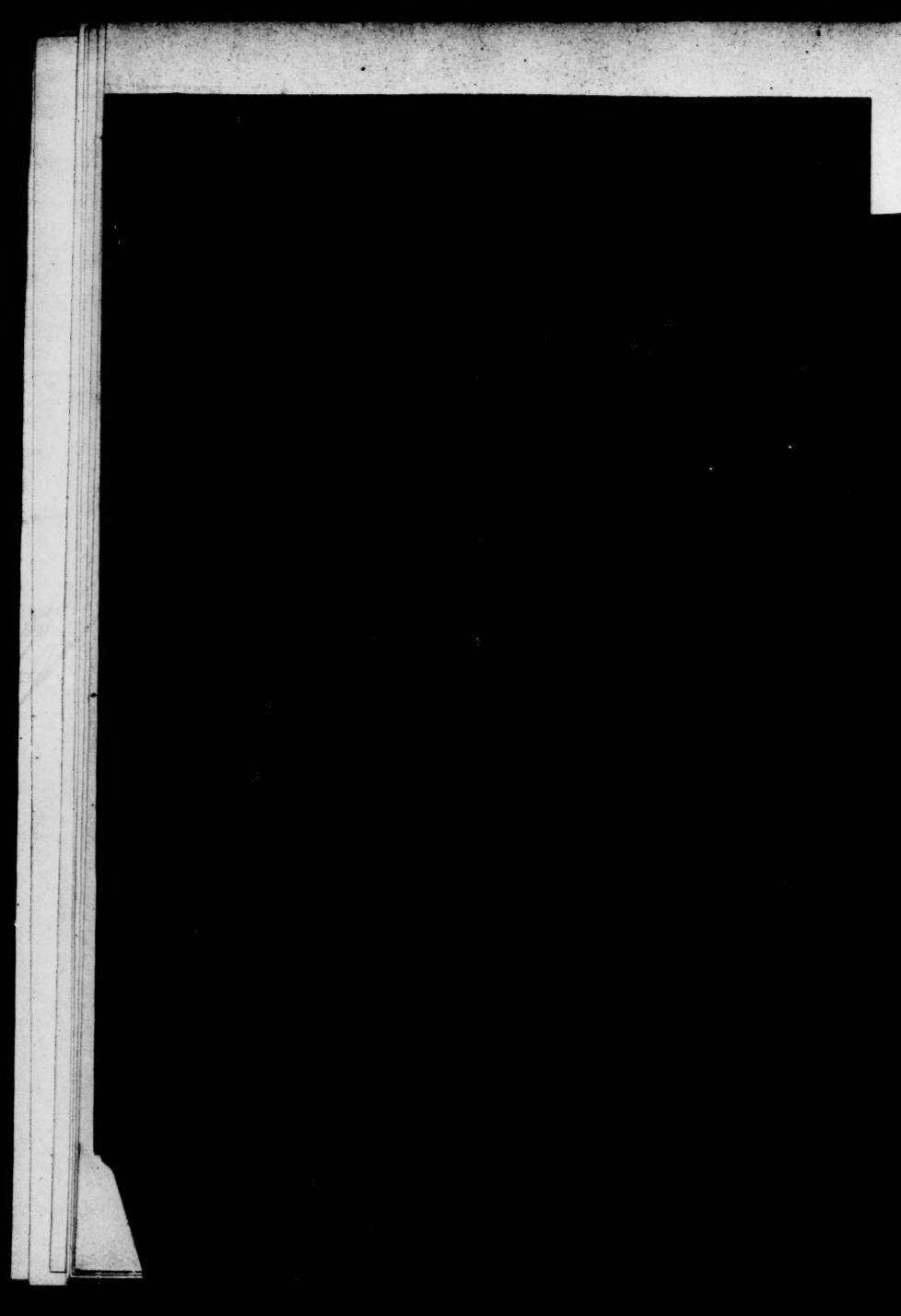
THE HOLYOKE WATER-POWER COMPANY, PLAINTIFFS IN ERROR,

vs.

THEODORE LYMAN AND EDWARD A. BRACKETT, COMMISSIONERS ON INLAND FISHERIES, ETC.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

FILED DECEMBER 28, 1870.



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INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	2	2
Citation	3	3
Bond	4	3
Bill of complaint	5	4
Answer	12	6
Amended answer	21	9
Replication	27	12
Decree	33	14

1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the justices of the supreme judicial court of the Commonwealth of Massachusetts, holden within and for the county of Suffolk, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment and decree in a suit in equity which is in the said supreme judicial court before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between Theodore Lyman and Edward A. Brackett, (Alfred R. Field, who joined with them in bringing the suit, having deceased,) as they are commissioners on inland fisheries within and for the Commonwealth of Massachusetts, plaintiffs, and The Holyoke Water-power Company, a corporation duly established under the laws of said Commonwealth, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Holyoke Water-power Company as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the third Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this thirtieth day of November, in the year of our Lord one thousand eight hundred and seventy.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States.

NOVEMBER 30, 1870.

Allowed by—

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

A true copy of this writ has been lodged in the clerk's office of the said supreme judicial court this second day of December, A. D. 1870, for the defendants in error.

Attest:

GEO. W. NICHOLS,
Ass. Clerk.

REC. 450—1

2 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

And now the judges of the supreme judicial court of said Commonwealth make return of this writ, by annexing hereto and sending herewith, under the seal of said court, as within commanded, a true and attested copy of the record and process in the suit within mentioned, and of all papers and exhibits filed therein, and of all proceedings therein.

In testimony whereof I, George C. Wilde, clerk of said court, within and for said county of Suffolk, have hereunto set my hand and the seal of said court this twenty-third day of December, in the year of our Lord eighteen hundred and seventy.

[SEAL.] GEO. C. WILDE,
Clerk.

3 The United States of America to Theodore Lyman, of Brookline, and Edward A. Brackett, of Winchester, all in the district of Massachusetts, as they are commissioners on inland fisheries within and for the Commonwealth of Massachusetts, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the third Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme judicial court of the Commonwealth of Massachusetts, within and for the county of Suffolk, wherein The Holyoke Water-power Company, a corporation duly established under the laws of said Commonwealth, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Nathan Clifford, justice of the Supreme Court of the United States, this 30th day of November, in the year of our Lord one thousand eight hundred and seventy.

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

BOSTON, MASS., *December 2d*, 1870.

I, as attorney of the defendants in error in the above entitled suit, admit due service this day of the within citation.

CHARLES ALLEN,
Attorney General of Massachusetts.

4 *Bond on writ of error.*

Know all men by these presents that we, The Holyoke Water-power Company, a corporation duly established by the laws of the Commonwealth of Massachusetts, as principal, and George M. Bartholomew, of Hartford, in the State of Connecticut, as surety, are held and firmly bound unto Theodore Lyman and Edward A. Brackett, as they are commissioners on inland fisheries within and for the Commonwealth of Massachusetts, in the full and just sum of fifteen thousand dollars, to be paid the said obligees, their successors in said office, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated the twenty-eighth day of November, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately at a term of the supreme judicial court of the Commonwealth of Massachusetts, begun and holden on the first Tuesday of October, A. D. 1870, to wit, on the twenty-third day of November, A. D. 1870, in a suit depending in said court between Theodore Lyman and Edward A. Brackett, (Alfred R. Field, who joined with them in bringing said suit, having deceased,) as they are commissioners on inland fisheries within and for said Commonwealth, who bring their bill in equity in behalf of said Commonwealth, complainants, and the said Holyoke Water-power Company, respondent, judgment was rendered against the said Holyoke Water-power Company; and the said Holyoke Water-power Company having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment and decree in the aforesaid suit, and a citation directed to the said Lyman and Brackett, as they are commissioners as aforesaid, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, on the third Monday of December next:

Now, the condition of the above obligation is such, that if the said Holyoke Water-power Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

The Holyoke Water-power Co.
By GEO. M. BARTHOLOMEW, [L. S.]
President.
GEO. M. BARTHOLOMEW, [L. S.]
Surety.

Signed, sealed, and delivered in presence of—
F. CHAMBERLIN.

Approved November 30, 1870.
NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:
[SEAL.]
JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

5 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

At the supreme judicial court, sitting at Boston, in said county of Suffolk, for the hearing of cases in equity, at the October term of said court, begun and holden on the first Tuesday of October, being the fourth day of said month, in the year of our Lord eighteen hundred and seventy, & on other days between said first Tuesday of October and the first Tuesday of April, eighteen hundred and seventy-one.

Theodore Lyman, of Brookline, in the county of Norfolk, Alfred R. Field, of Greenfield, in the county of Franklin, and Edward A. Brackett, of Winchester, in the county of Middlesex, against The Holyoke Water-power Company, in a bill in equity, in the words following, to wit:

To the honorable the justices of the supreme judicial court, within and for the county of Suffolk, and Commonwealth of Massachusetts:

Humbly complaining, shew unto your honors, your orators, Theodore Lyman, of Brookline, in the county of Norfolk, Alfred R. Field, of Greenfield, in the county of Franklin, and Edward A. Brackett, of Winchester, in the county of Middlesex, (who bring this bill in
6 their name as commissioners on inland fisheries, but in behalf of the Commonwealth of Massachusetts,) that by virtue of and under the provisions of an act of the legislature of said Commonwealth, passed in the year of our Lord one thousand eight hundred and sixty-six, entitled "An act concerning the obstructions to the passage of fish in the Connecticut and Merrimack rivers," (and subsequent acts upon the same subject-matter,) the governor of said Commonwealth, by and with the advice of the council of said Commonwealth, appointed said Theodore Lyman and Alfred R. Field, the twenty-ninth day of June, A. D. 1866, and said Edward A. Brackett, the seventh day of July, A. D. 1869, commissioners of inland fisheries for the term of five years from and after the dates of their appointments.

And your orators duly accepted said office of commissioners to which they had been appointed as aforesaid; and ever since said appointment they have and now hold said office. And your orators, in pursuance of the duties & obligations required of them under said act, by virtue whereof they were appointed, proceeded to examine the several dams on said rivers in the Commonwealth; and, after due notice given to the owners and proprietors of said dams, as required by section second
7 of said act, did determine and define the mode and plan upon which fisheries should be conducted, suitable & sufficient in the opinion of your orators, to secure the free passage of salmon and shad up said rivers during their accustomed seasons. And your orators further shew, that the State of New Hampshire, by an act of its legislature, passed in the year of our Lord one thousand eight hundred and sixty, authorized the appointment of commissioners of fisheries in said rivers, and authorized said commissioners to act in reference to said fisheries, and the construction of fishways to secure the passage of salmon and shad up said rivers in said State of New Hampshire. And under said act of the State of New Hampshire, commissioners were appointed, with authority to act as aforesaid, and accepted said appointment. And said orators submitted a full & specific statement and description, and plan of the fishway so determined as aforesaid, to said commissioners of the State of New Hampshire, which said commissioners approved the plan of said fishways so submitted by your orators. And your orators further shew, that the Holyoke Water-power Company, a corporation duly established by laws of this Commonwealth, are the owners & proprietors of a certain dam, constructed upon and across the
8 Connecticut River, at Holyoke, in the county of Hampden and Commonwealth aforesaid; & prior to the erection and maint'ence of said dam, fish, both salmon and shad, were accustomed to pass up said river in said river to *to* their spawning beds, above said dam; and such fish in said river were a source of great value to the Commonwealth, furnishing large amounts of food to the inhabitants, and were a source of great value and income to the riparian proprietors upon said river, both above and below said dam; but the erection of said dam has proved an effectual bar to the passage of all fish, especially shad and salmon, up said river to their accustomed spawning beds, at all seasons of the year, and has prevented said fish from passing up said river at their accustomed seasons, and has effectually destroyed all fish rights,

both above and below said dam, and has effectually prevented the passage of said fish up said river as aforesaid. And your orators further shew that, in pursuance of their duties as such commissioners, after due notice to said Holyoke Water-power Company, they examined the dam of said corporation, and determined the mode and plan upon which a fishway should be constructed, suitable and sufficient, in their opinion, to secure the free passage of salmon and shad up said river, and
9 over said dam, during their accustomed seasons, and furnished a plan and specifications for such fishway to said corporation, and filed a copy thereof in the office of the secretary of the Commonwealth of Massachusetts, with an affidavit of the fact that such plan & specifications had been furnished to said corporation.

And your orators further show that said plan and specifications were furnished by your orators to said corporation, on , & said corporation were requested and required to build & complete said fishway in accordance with such plan & specifications. A copy thereof is hereto annexed, marked "A." And your orators hoped that the said corporation would have constructed said fishway, and have agreed with your orators for building the same, as by law they should do. But now so it is, may it please your honors, that the said corporation utterly refuses to construct said fishway, or to agree with your orators for the construction of the same, and have so refused for more than thirty days since your orators have furnished to them a plan and specifications for building said fishway; said corporation pretending that they are not by law required to construct said fishway, or to agree with your
10 orators for the construction of the same, and that the Commonwealth of Massachusetts have no power or right to command or require them to build such fishway. Whereas your orators charge the contrary of all such pretence to be true, as they say said corporation is, by law, required to build such fishway according to said plan and specifications furnished as aforesaid; but, nevertheless, the said Holyoke Water-power Company, under such and other like pretences, utterly refuses to build and construct such fishway, and refuses to agree with your orators for the construction of the same.

To the end, therefore, that said corporation may, by its officers, true answer make to all and singular the matters hereinbefore stated & charged, as fully and particularly as if the same were hereinafter repeated, and they thereto distinctly interrogated; and more especially that they may answer whether your orators, after due notice, determined and made a plan for a fishway over the dam of said Holyoke Water-power Company, for the free passage of salmon and shad, as before stated; and whether said company are the proprietors of said dam; and whether said company have been furnished with a plan and specifications for said fishway; and whether for more than thirty days after such plan & specification were furnished, they have refused
11 to construct said fishway or to agree with your orators for the construction of the same; but your orators expressly waive any answers to the matters and things herein complained of and set forth on oath:

And, to the end, that said corporation may be compelled, by decree of this honorable court, specifically to build and construct said fishway, according to said plan & specifications; and that your orators, in behalf of the Commonwealth of Massachusetts, may have such further and other relief in the premises as to your honors may seem meet and the case may require:

And may it please your orators to grant unto your orators your writ

of subpœna, to be directed to the said Holyoke Water-power Company, thereby commanding said corporation at a certain day and under a certain pain and penalties therein to be specified, to be and appear before your honors, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein, as to your honors shall seem meet; and your orators shall ever pray.

THEODORE LYMAN.
E. A. BRACKETT.

JA'S F. CLARK,
Of Counsel for Compt's.

12 SUFFOLK, *ss:*

MARCH 14*th*, *A. D.* 1870.

Then personally appeared the aforesaid Theodore Lyman and E. A. Brackett, and made oath that all the allegations of the aforesaid bill of complaint within their knowledge are true, as that all other allegations therein are true, according to their best information and belief.

JA'S F. CLARK,
Justice of the Peace.

This bill was filed on the fourteenth day of March, eighteen hundred and seventy, and was entered in this court at the April term thereof in said year, when and where the parties appeared, and the defendants filed their answer as follows:

The said defendants came, and for answer to the bill filed by the plaintiffs say, they admit that the plaintiffs were duly appointed, as they allege, and that by proper legislation they were authorized to bring this suit, and that they have examined the dams in Massachusetts, as they allege.

The also admit the allegations of the bill in reference to the doings of the State of New Hampshire, and of the commissioners appointed by that State, and that a plan of fishway was submitted to said last-
13 named commissioners, and approved by them, as is alleged.

They also admit their own existence as a corporation and their ownership of a dam across the Connecticut River at Holyoke, substantially as is alleged.

They also admit that, before the erection of their said dam, shad were accustomed to pass up said river as far as the Montague dam at Turner's Falls, and that said fish were of some value to citizens of said State, who were private owners of riparian fish-rights, for sale as food, and that they were to some extent, a source of income to such riparian proprietors upon said river, both above and below said dam; but they say that salmon had ceased to be found in said stream for many years before the building of said dam.

They also admit that their said dam has prevented fish from going above it in said river, and that it has destroyed fish-rights between said dam and the said Montague dam; but they deny that it has destroyed or materially injured or damaged fish-rights or owners of such rights below the dam of defendants.

For the purposes of this case, they admit that the plaintiffs have determined a mode and plan of a fishway over said dam, sufficient,
14 in their opinion, to secure the free passage of salmon and shad, as they allege, and that they furnished a plan and specification to the defendants, and filed a copy thereof, as they allege; and also that a plan and specification were furnished to the defendants on

and that they were requested and required to build and complete said fishway in accordance therewith, and that they refused, for more than thirty days, and now refuse to build at their own expense, said fishway, or to agree with the plaintiffs so to build it, and that they have claimed, and do now claim, that they are not by law obliged to build the same, as aforesaid, and that the Commonwealth of Massachusetts has no right to require them so to build said fishway.

The defendants allege, in excuse and justification of such refusal and claim, that the "Hadley Falls Company" was duly incorporated by the legislature of Massachusetts, by an act passed April 28, A. D. 1848; that in and by said act, constituting the charter of said Hadley Falls Company, the said company was authorized and empowered to build and maintain a dam across the said Connecticut River as the same was built by said company, and is now maintained by these defendants; upon condition, however, (also set forth in said charter,) that
15 said Hadley Falls Company should pay to the owners of fishing-rights, existing at that time above said dam, such damages as should be awarded by the county commissioners of the counties in which said rights existed.

That said Hadley Falls Company accepted said charter and were duly organized under and according to its provisions and duly paid all damages to owners of fishing-rights above their dam, as in and by said charter is required.

That said Hadley Falls Company expended, including damages to owners of such fishing-rights, over two million of dollars, and then failed.

That, by an act of said legislature, passed in the year 1859, the defendant corporation was chartered, for the purpose of "upholding and maintaining said dam, and one or more locks and canals in connection therewith, & of creating and maintaining a water-power, to be used, sold, or leased for manufacturing or mechanical purposes; and in and by said act the defendant company was authorized to purchase, take, hold, receive, sell, lease, and dispose of, all or any of the estate, real, personal, or mixed, with all the water-power, water-courses, water-privileges, dam, canals, rights, easements, and appurtenances thereto pertaining or
16 belonging, or therewith connected, or which had at any time theretofore belonged unto and been the property of said Hadley Falls Company."

That the defendant company duly accepted said charter and was duly organized under and in pursuance of its provisions, and purchased under the authority above set forth all property and rights of property of said Hadley Falls Company, and have upheld & maintained said dam and locks and canals, & have sold, leased, and used the power created by said dam and property for mechanical and manufacturing purposes, and became, by force of said legislation and of said purchase, the successors and representatives of said Hadley Falls Company and owners of all its property and rights.

That there are now more than twenty different corporations dependant upon said water-power to carry on their business, which is very large, involving ninety-six thousand cotton spindles, twenty-four sets of woolen machinery, one hundred and seventeen paper engines of large size, besides a very extensive machine-shop and other machinery requiring and controlling several millions of dollars of capital and
17 gathering to it and furnishing business for a growing town, which has now a population of about twelve thousand persons.

That it is admitted by the plaintiffs, in their report to the said Com-

monwealth for the year 1866, at page 11, that the fishway sought for "must use a certain amount of water-power," and that "this would be so much subtracted from the power of the company in whose dam it should be placed;" and on page forty-one of same report, that such "fishway would injure or inconvenience the manufacturer more or less seriously," both of which statements the defendants say are true.

That in their very numerous & important contracts of sale and lease of water-power, the defendants have sold and contracted with reference to the present height of their dam & the power created thereby; and the canals of the company, and the wheels and machinery of the numerous companies dependant upon said dam & the power created thereby, are set to such level as is called for and will be secured by the continuance of said dam and power in all respects as it now is; that the defendants have guaranteed such mill-powers so to be continued for long terms amounting to a substantial perpetuity; and that said defendants are now expending a sum equal to nearly or quite their original
18 capital, to secure the maintenance of said dam; that its stockholders are numerous; have purchased said stock in reliance upon the terms and stipulations set forth and contained in said charters, and of the agreements of the State of Massachusetts, also set forth & contained therein.

That said corporation has been compelled to withhold dividends from its stockholders, and will be compelled to withhold them for long time to come, by reason of the great expense which they have incurred, and are now incurring, in the performance of the obligations which were involved in their acceptance of said charters.

And the defendants allege that all these facts were well known to the plaintiffs, and were by them communicated to the said Commonwealth, to wit, in the reports of the said commissioners of the years 1866, at pages 11, 29, & 41, and of 1867, p. 3.

The defendants further allege that the fish-rights both above and below said dam were, & are, private property; that those above the dam were destroyed by the building of defendant's dam, and damages therefor were paid, as hereinbefore was alleged.

That no damages were contemplated or provided for by the legislature on behalf of the owners of fish-rights below said dam, nor have
19 such owners ever, with the knowledge of these defendants, claimed that their rights were diminished in value by said dam, nor has any claim of damages been in any form made by such owners on account of any damages by them sustained.

That if fish-rights above the dam should be restored by such fishway as is prayed for by plaintiffs' bill, it would be at a cost of about thirty thousand dollars, and they would be the private property of those who have heretofore been paid damages for their destruction, as is above alleged.

The said defendants admit that shad have been diminishing in number in said river for a long time past, to wit, for fifty years, and more than that; such diminishment has continued since the building of their said dam; but they say that such diminishment is due to other causes than said dam, to wit, to dams at or near the mouth of tributaries of said river, to the water-wheels, and other machinery & canals, below said dam of the defendants, at Chicopee and at Windsor Locks, by which a large proportion of the fish passing down the river are killed; to the clearing up of forests, and the drainage of land in the meadows and swamps, and by the sewerage of large towns, and other causes
20 the same and similar to those which had driven the salmon out of

said river before the building of defendants' dam, and for which these defendants are not responsible.

And the defendants say that by reason of the facts hereinbefore stated, and especially because they and the Hadley Falls Company (which last-named company the defendants, in all respects as to property, rights, power, & privileges, represent,) have performed on their part, in all things, the conditions and requirements of the contract set forth & contained in said charters, the legislation of said State referred to, and relied upon by the plaintiffs in so far as is required, or authorizes to plaintiffs to require, the defendants to build a fishway over their said dam at the expense of said defendants, is, as to them, unconstitutional, invalid, and void; and further say that the plaintiffs are without equity, and that the relief prayed for by them is against equity; and defendants pray that they may be hence dismissed with their costs.

Holyoke Water-power Company,

By F. CHAMBERLAIN, *Attorney.*

Filed March 14, 1870.

21 And the said defendants had leave to amend their said answer as follows:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk County.*

Supreme judicial court.

THEODORE LYMAN ET AL., COMMISSIONERS OF inland fisheries, on behalf of the Commonwealth of Massachusetts,
versus
THE HOLYOKE WATER-POWER COMPANY.

And now comes the respondent, and asks leave to file the following amended answer to the answer already filed in said suit:

Amended answer of the respondent.

This respondent says that the acts of the legislature of the Commonwealth of Massachusetts, under and by virtue of which the complainants were appointed commissioners of inland fisheries, and under and by virtue of which they claim the rights and powers alleged in the bill of complaint are an act entitled "An act concerning the obstructions to the passage of fish in the Connecticut and Merrimack rivers," approved May 15, 1866; an act entitled "An act to regulate fisheries," approved June 1, 1867; an act entitled "An act for encouraging the cultivation of useful fishes," approved June 12, 1869.

That the said act of incorporation of the Hadley Falls Company was approved April 28, 1848, and is in these words, (1848, ch. 222:)

22 "AN ACT to incorporate the Hadley Falls Company."

"*Be it enacted by the senate and house of representatives, in general court assembled, and by the authority of the same,* as follows:

"SEC. 1. Thomas H. Perkins, George W. Lyman, Edmund Dwight, their associates and successors, are hereby made a corporation by the name of The Hadley Falls Company, for the purpose of constructing and maintaining a dam across the Connecticut River, and one or more locks and canals in connection with the said dam, and of creating a water power, to be used by said corporation for manufacturing articles from

cotton, wool, iron, wood, and other materials; and to be sold or leased to other persons and corporations, to be used for manufacturing or mechanical purposes, and also for the purposes of navigation; and shall have all the powers and privileges, and be subject to all the duties, liabilities, and restrictions set forth in the thirty-eighth and forty-fourth chapters of the Revised Statutes.

"SEC. 2. Said corporation may hold real estate not exceeding in value five hundred thousand dollars, exclusively of improvements; and their whole capital stock shall not exceed four millions of dollars, which shall be divided into shares of five hundred dollars each.

23 "SEC. 3. Said corporation is hereby authorized and empowered to construct and maintain a dam across said river at South Hadley, at any point between the present dam of the proprietors of the locks and canals on Connecticut River and the lower locks of said proprietors, & of a height sufficient to raise the water to a point not exceeding the present level of the water above said last-mentioned dam.

"SEC. 4. Said corporation shall pay such damages to the owners of the present fishing rights existing above the dam which the said company is herein empowered to construct, as may be awarded by the county commissioners of the counties in which said rights exist.

"SEC. 5. The Hadley Falls Company, or any of the owners of said fishing rights, may at any time apply to said commissioners to proceed to ascertain and determine the damages to said fishing rights; and, on such application, the said county commissioners shall appoint a time and place of meeting, to hear the parties interested, by advertising the same in one or more newspapers published in the counties of Hampshire and Franklin four weeks at least previously to the day fixed for said meeting; and the said commissioners shall determine and award the

24 damages to the said fishing rights within sixty days from the date of said application to them for that purpose; subject, however, to an appeal to a jury from such assessment, in the same manner, and with the like proceedings, as in cases of assessment of damages by county commissioners for land taken for highways; and all expenses accruing under such application to, and determination of, the county commissioners shall be borne by the Hadley Falls Company.

"SEC. 6. For the purpose of reimbursing said corporation, in part, for the cost of keeping said locks and canals in repair, & tending the same, it shall be lawful for them, with the consent of the proprietors of the locks and canals on Connecticut River, to charge on all descriptions of merchandise, boats, and rafts, the same rates of toll as are allowed by law to the said proprietors for similar services.

"SEC. 7. It is not intended hereby to empower the Hadley Falls Company to injure the works of the Connecticut River Railroad Company; and all questions which may arise between them, under the provisions of this act, may be adjusted according to the mutual agreements already existing, or hereafter to be made, by said companies.

"SEC. 8. This act shall take effect from and after its passage." (Approved "April 28, 1848.")

25 That the said act of incorporation of the Holyoke Water-power Company was approved January 31, 1859, and is in these words, (1859, ch. 6 :)

"AN ACT to incorporate the Holyoke Water-power Company.

"*Be it enacted, &c.*, as follows:

"SEC. 1. William Appleton, George W. Lyman, Francis Bacon, Augustus H. Fiske, their associates and successors, are hereby made a cor-

poration by the name of the Holyoke Water-power Company for the purpose of upholding and maintaining the dam across the Connecticut River, heretofore constructed by the Hadley Falls Company, & one or more locks and canals in connection with the said dam, and of creating and maintaining a water-power to be used by said corporation for manufacturing and mechanical purposes, and to be sold or leased to other persons or corporations to be used for like purposes; and shall have all the powers and privileges, and be subject to all the liabilities and restrictions set forth in the thirty-eighth and forty-fourth chapter of the Revised Statutes, and in the two hundred and seventy-sixth chapter of the acts of the year one thousand eight hundred and fifty-seven.

"SEC. 2. The said corporation shall have full power and authority to purchase, take, hold, receive, sell, lease, and dispose of all and any part of the estate, real, personal, or mixed, with all the water-power,
26 water-courses, water-privileges, dams, canals, rights, easements, and appurtenances thereto pertaining or belonging, or therewith connected, or which have at any time heretofore belonged unto or been the property of the said Hadley Falls Company, and any other real estate that may be required for the use of said corporation for purposes contemplated by this act.

"SEC. 3. For the purpose of reimbursing the said corporation, in part, for the cost of keeping said locks and canals in repair, and attending unto the same, it shall be lawful for them, with the consent of the proprietors of the locks & canals on the Connecticut River, to charge, on all descriptions of merchandise, boats, and rafts, the same rates of toll as are allowed by law to the said proprietors for similar services.

"SEC. 4. The capital stock of said corporation shall not exceed the sum of six hundred thousand dollars, to be divided into shares of one hundred dollars each; and no shares in the capital stock thereof shall be issued for a less sum or amount, to be actually paid in on each, than the par value of the shares which shall be first issued.

"SEC. 5. This act shall take effect from & after its passage." (Approved "January 31, 1859.")

The respondent contends that these acts of incorporation, and the acceptance of them by the corporations, and the organization of
27 the corporations under them, constitute contracts; that by the alleged acts and doings of said corporations under said acts, and particularly by the payment of all damages to owners of fishing rights above the dam, as in by said act of incorporation, approved April 28, 1848, is required, rights of property have become vested in the respondent to maintain said dam as the same was built by the said Hadley Falls Company, without being required to build & maintain fish-ways in the manner and form as alleged by the complainants in said bill of complaint; and that the said acts of the legislature of Massachusetts, approved respectively May 15, 1866, June 1, 1867, and June 12, 1869, are laws impairing the obligation of said contract, and, so far as they purport to require the building and maintaining of fish-ways over or around dams, are, in reference to this respondent and the said dam maintained by it, in violation of the Constitution of the United States, and void; and particularly, are in violation of that clause of the tenth section of the first article of said Constitution, which prohibits a State from passing a law impairing the obligation of contracts.

And the complainants filed their replication, as follows:

Supreme judicial court, Suffolk, ss:

28 THEODORE LYMAN ET ALS., COMMISSIONERS of inland fisheries, on behalf of the Commonwealth of Massachusetts,
versus
THE HOLYOKE WATER-POWER COMPANY.

Replication of complainants.

And now comes said complainants and join issue on the answer of respondent.

JOS. F. CLARK,
For Complainant.

MARCH 14TH, 1870.

And the cause was heard and reserved for the full court, on the following report:

Supreme judicial court, Suffolk County.

THEODORE LYMAN & OTHERS, COMMISSIONERS of inland fisheries, on behalf of the Commonwealth of Massachusetts,
versus
THE HOLYOKE WATER-POWER COMPANY.

Report.

The above-entitled case was heard before me upon the bill, answer, replication, and proofs. The facts set up in said bill and answer were, for the purposes and issues of the case, admitted by the parties to be true, except as to the allegations:

1st. That salmon had been driven from the Connecticut River by the defendant's dam; as to which it was agreed that the statements of the answer are substantially true; and—

2nd. The parties were at issue upon the question, whether the defendant's dam had caused a decrease of shad below it in this State.

It was admitted by the defendants, as stated in their answer,
29 that there has been a decreasing quantity of shad in said river for the last fifty years, and that such decrease had been continued in said State since the building of the dam of the defendants, and had amounted, for the last 25 years, to 25 per cent. or more.

The plaintiffs claimed that such decree was caused by the said dam, which the defendants denied.

Witnesses were called who testified as to their knowledge of the river and its fisheries, and some of them gave their opinion as experts without objection by either party. It appeared that the breeding ground between said dam and Turner's Falls was cut off by the building of the defendant's dam, but it was also shown that the fishing ground was cut off to the same extent; the fisheries so destroyed being those paid for as alleged by the defendants in their answer.

It was proved that the facilities for taking fish from the river below the dedefendant's dam by an enlarged number of fisheries, and of nets of all kinds along the river & at its mouth, and of fish-pounds at the mouth of the river and in the sound, had been greatly increased since the building of the

defendant's dam, and that by these means and the more vigorous prosecution of the business of taking the fish in all these ways
30 below the dam in Massachusetts and in Connecticut, and at the mouth of the river, extending into the sound, the passing of the fish up said river is much more seriously impeded now than at the time said dam was built, and that a smaller proportion of the fish entering said stream or coming near the mouth of it for the purpose of entering succeeded in getting as far north as the south line of said State now than at any time. That the increase of manufacturing on the banks of the river, and its tributaries has to some extent polluted the water; that by the clearing of the woods towards the head-waters of said river, and by the drainage of swamps and the sewerage of large towns, the annual and other freshets in said river have been increased in volume and in the turbidness of the water, & shortened in their duration.

The defendants claimed that the supply of fish below their dam in Massachusetts would be diminished by all these causes; and upon the evidence before me I was of opinion that they were so diminished. Upon the question whether the fisheries below the dam were materially damaged by its maintenance, the evidence was seriously conflicting; it did not appear that any owners of such fisheries had ever claimed that they were so damaged. The only practical fishermen who were
31 called were owners of fisheries below the dam, a little south of the State line; familiar with the river fisheries for many years, one of them having been familiar with the river from said dam to its mouth for thirty years or more; they both testified that in their judgment such fisheries below said dam were not so injured.

Mr. Lyman, the chairman of said commissioners, was the only witness examined for the plaintiffs. He testified as to the habits and instincts of shad; and, among other things, that those spawned in the breeding grounds above said dam would return to those breeding grounds to deposit their spawn; that when shut out from the grounds, they would after a time disappear from the river, and that such source of supply would thereby be cut off, and the fish below the dam would be decreased in numbers and the fisheries thereby diminished in value; and that, in his opinion, a proportion of the decrease in number of fish below the dam*e* since its erection was due to this cause.

Upon the evidence given by him, I find that a small but appreciable proportion of such decrease was due to the maintenance of said dam; upon the evidence before me I am not able to estimate the proportion.

Upon the testimony of Mr. Lyman, I find that the fish-way which
32 said commissioners now require the defendants to build and maintain would not diminish the water-power of the defendant company, except when they may desire to add to the permanent height of their dam by flash-boards.

All questions of law raised by the bill, answer, and report as to the constitutionality & validity of the legislation upon which the plaintiffs' case rests, are reserved for the consideration of the full court.

The bill, answer, and this report to be printed, and either party to be at liberty on the hearing to refer to the legislation which is set forth as referred to therein.

JAMES D. COLTS,
J. S. J. C.

And the case was thereupon continued unto the last April term, when the death of Alfred R. Field, one of the complainants, was suggested by Charles Allen, attorney general, who appears for the complainants.

And it was ordered by the supreme judicial court for the Commonwealth, by its rescript, that the clerk of the supreme judicial court for the county of Suffolk, make the following entry under this case in the docket of said court, viz:

Decree for the complainants.

Thereupon the case was continued unto the present term. And now the final decree is entered as follows:

SUFFOLK, *ss:*

Supreme judicial court. October term, 1870.

33 THEODORE LYMAN
vs.
HOLYOKE WATER-POWER COMPANY.

Decree.

This cause came on to be heard and was argued by counsel, and these questions of law arose in said case. Whether the statutes of the Commonwealth of Massachusetts under which the complainants claim to have the rights and powers, and to be subject to the duties alleged in their bill of complaint; and whether the authority in said bill claimed by them under said statutes, so far as they purport to require or to authorize complainants to require the respondent, at its own cost, to build and construct a fish-way over its said dam, in manner and form as is set forth in said bill, are or are not valid, on the ground of their being repugnant to the Constitution of the United States of America. And thereupon, upon consideration thereof, it is adjudged and decreed that said statutes of the Commonwealth of Massachusetts, and the said authority claimed thereunder by the complainants in their said bill are valid, and are not repugnant to the Constitution of the United States; and it is further ordered, adjudged, and decreed, that the Holyoke Water-power Company build and construct a fish-way to allow the passage of fish above its dam across the Connecticut River at Holyoke, in this Commonwealth, in accordance with the plan and specifications referred to in the complainants' bill; and that the complainants recover of the respondent their costs, to be taxed by the clerk.

34

By the court.

NOVEMBER 23, 1870.

GEO. C. WILDE,
Clerk.

(Indorsement on cover:) No. 450. The Holyoke Water-power Company, plaintiffs in error, vs. Theodore Lyman and Edward A. Brackett, commissioners, on inland fisheries, &c. Massachusetts supreme judicial court. Filed 28 December, 1870.

The Holyoke Water Power Company,

PLAINTIFFS IN ERROR,

VS.

THEODORE LYMAN and others,

Commissioners of Inland Fisheries on behalf of The Commonwealth of Massachusetts,

DEFENDANTS IN ERROR.

F. CHAMBERLIN,

Counsel of Plaintiffs in Error.

Supreme Court of the United States.

THE HOLYOKE WATER POWER COMPANY,

PLAINTIFFS IN ERROR,

VS.

THEODORE LYMAN AND EDWARD A. BRACKETT,

COMMISSIONERS ON INLAND FISHERIES, ETC.,

DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief of Plaintiff in Error.

This case comes to this Court under the twenty-fifth section of the Judiciary Act of the United States, because of alleged error in the rendition of a decree of the Supreme Judicial Court of Massachusetts, in a suit in equity wherein was drawn in question the validity of certain statutes of Massachusetts, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity.

The Statutes in question were chapter 238 of the Acts of 1866; chapter 344 of the Acts of 1867, and chapter 384 of the Acts of 1869.

The second section of the act of 1866 authorizes the Com-

missioners of Fisheries to examine the several dams on the rivers of Massachusetts, and after notice to the owners thereof, to determine and define the mode and plan upon which suitable and sufficient fishways should be constructed. The 3d, 4th, 5th, and 6th sections regulate the plans, methods, &c., and the 7th section provides that if any proprietor shall refuse or neglect to agree with the Commissioners to build the fishways for thirty days after a plan is duly furnished him, the Commissioners may build the same at his expense.

The remaining sections of the act are not important in this connection. By the subsequent acts of 1867 and 1869, the powers of the Commissioners are considerably enlarged, but their provisions in detail are not important to the consideration of the questions here raised. It is admitted for the purposes of the case, that under and in pursuance of this legislation, the plaintiffs in error were required to build a fishway in their dam, and that they refused to comply with such requirement, and sought, and now seek to justify such refusal on the ground that by reason of the matters set forth and contained in their answer, and amended answer, the legislation referred to is, as to them, unconstitutional, invalid, and void.

Statement of Facts.

The plaintiffs in error are a corporation organized under a charter granted by the State of Massachusetts, in pursuance of which they purchased of the Hadley Falls Company, a preceding corporation, a dam across the Connecticut river erected by said last named corporation under their charter, and the locks and canals connected therewith, for a large sum of money, and thereby succeeded to all the rights and privileges of said Hadley Falls Company.

The charter of the Hadley Falls Company, provided in section 3 (page 10 of case) that said corporation was authorized and empowered to construct and maintain a dam "across Connecticut river to the height therein provided;" and the plaintiffs in error by their charter (page 11 of case) were made a cor-

poration "for the purpose of upholding and maintaining the dam" built by the Hadley Falls Company, and the canals, &c., and creating and maintaining a water power, &c.

We presume it will not be denied, that the plaintiffs in error have the same rights and privileges, and stand in the same relation to the State, as to their rights connected with said dam, as the Hadley Falls Company.

The fourth section of the charter of the latter Company is as follows: "Said corporation shall pay such damages to the owners of the present fishing rights existing above the dam which the said Company is bound to construct as may be awarded by the County Commissioners of the counties in which said rights exist."

The Hadley Falls Company accepted their charter, built a dam at the place mentioned, expended over two millions of dollars, paid damages to owners of fishing rights, and the plaintiffs in error then purchased their property for a large sum of money.

Long after such purchase the legislature of Massachusetts, in 1866, 1867, and 1869, appointed the defendants in error commissioners of fisheries, with power to require fishways to be erected in *any* dam, such as they or any one of them should direct, and they required the plaintiffs in error to construct a fishway in said dam which would cost from thirty to forty thousand dollars, which they refused to do, and the present bill in equity was brought in accordance with the statutes of said State to enforce such erection.

It is found that the maintenance of said dam did in some small but appreciable degree decrease the supply of shad in the Connecticut river below the dam, but how small this decrease was, whether ten shad or a hundred is not found, nor could it be estimated, nor is it found that *any* appreciable damage was done to the *owners of fishing rights* below the dam.

Upon these facts in substance the plaintiffs in error claimed that the granting of said charters, their acceptance, and the expenditure of moneys under them, especially in the payment of damages to the owners of fishing rights above the dam, constituted a contract between them and the state that they might maintain their dam without being obliged to build fishways, the obligation of which was impaired by the statutes hereinbefore mentioned.

The Supreme Judicial Court of Massachussetts held that said statutes did not impair the obligation of any contract so existing, and to revise that decision this writ of error was brought.

PLAINTIFFS' POINTS.

I.

We claim that these charters constituted a contract between us and the state, that we might erect and maintain a dam exactly as therein described, without change or alteration thereafter; that on our acceptance of the charter, and erection of the dam, a *right* vested in us so to maintain said dam, and that the state cannot take away this right, or force us to change, alter, or modify this dam without compensation.

It is too well settled to require citation of authority that a charter to a corporation is a contract with them, on the part of the state, that they may do the things therein mentioned, and that any law interfering in any way with the exercise of any rights given by the charter, impairs the obligation of that contract, and is invalid.

Nor will it be denied by the defendants in error that by this charter *some* contract was made with us, and whatever that was, if the law in question impairs its obligation, the law is void. The only question that can arise in the case at bar is, what contract was made, or what rights were given by this charter?

Where an absolute right to do an act is given, a contract is made that the state will do no act to impair that absolute right, will not annex new conditions or additional terms.

If an absolute grant of land is made, the state cannot thereafter annex a condition restricting its use; if power is given to erect a bridge of a certain character, the state cannot cause the owner to make an alteration in it, and the same rule will apply to a right to make a dam without any reservation.

In the case of The People *vs.* Platt, 17 Johnson, p. 195, the State of New York had granted lands on both sides of the Saranac River, without any reservation of the river, or any restriction on the use of it expressed in the grant. By a statute subsequently passed, owners of all dams were required to make fishways, and it was held that such a requirement was unconstitutional as to the defendants, because the unrestricted use of the land and river was given, and it could not be afterwards restricted, and they say on p. 213: "The general words of the statutes ought to be construed with an implied exception of such rivers as had been fully and absolutely granted, without any reservation on the part of the state of a right to control the perfect use and enjoyment of the thing granted;" and on page 215, "The principle adopted by the Supreme Court of the United States extends as fully to a case where a material and essential part of the grant is impaired as to a case where it is entirely impaired."

In the case of Commonwealth *vs.* New Bedford Bridge, 2 Gray, p. 399, a charter was granted to erect a bridge, with draws of a certain width, and it was held that a statute ordering draws of an increased width to be built was void. The court say, on p. 348, "Nor can the legislature, without the assent of the defendants, in any way impair the original terms of the charter *by annexing new conditions or imposing additional burdens*, onerous in their nature or inconsistent with a reasonable construction of the compact."

In West River Bridge Company *vs.* Dix, 6 Howard, p. 507, this court on p. 533 give the same construction of this clause of the Constitution, and say, "The language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of *some new term or condition* foreign to the original agreement, and therefore inconsistent with and violative thereof."

In Enfield Bridge Co. *vs.* Connecticut River Co., 7 Conn., p. 28, the Court say, on p. 48: "It is not a principle that a grant may be infringed if the variation be not great. As every variation violates, small injuries are as much prohibited as large ones, and the least right is as anxiously protected as the greatest."

Applying these principles to the case at bar, we find an unreserved and unconditional right to erect and maintain a dam across the Connecticut River. Does not a Statute that we shall erect a fishway at a cost of forty thousand dollars, or at any cost which the defendants see fit to require, without any reservation in the grant, "interfere with our perfect use and enjoyment of the thing granted."

It is evident, also, that in granting these charters the Legislature had this principle in mind; for both in this charter, and in those of the Essex Co., hereinafter referred to, they made provisions which were intended to reach this very matter of fishways. In the first Essex charter, they provided that a certain kind of fishway should be made; in the second

they provided, as in ours, that damages should be paid to certain persons supposed to be affected. If they had full right at any time thereafter to annex any conditions or terms they saw fit to their charters, why should they have been so solicitous.

But it is attempted to avoid this rule, by saying that although there is no express reservation at all in the grant, yet that in Massachusetts, in all charters authorizing the erection of *dams*, there is an *implied* reservation, of a right to require the grantees to make any *fishways* in those dams which the Legislature may think desirable.

This claim seems to be founded on a custom, or usage, or sort of general understanding in that State, arising from the supposed practice of the Legislature in passing such laws.

How far the provision of the Constitution might be avoided by showing such a continuous breaking of it, that all the inhabitants of a State are estopped from complaining of it, we need not inquire, for on a consideration of the decisions in Massachusetts, it will be seen that no such implied condition has ever been claimed to exist in cases of charters.

The Courts have only laid down the general principles, that owners of lands or privileges on streams, if they erect dams on them, do so subject to the usual rule that they must so manage them as not to interfere with the right of persons above or below, either to have the water flow, or to have fish pass.

The case of Stoughton *vs.* Baker, 4 Mass., 522, is the leading case on this subject; but in that case there was no charter by the Legislature to the builder of a dam, and no constitutional question arose. It was only held that "owners of dams" held them subject to the implied right of the State to pass laws on such public subjects as fisheries, &c.

Commonwealth *vs.* Chapin, 5 Pick., 199, was a similar case.

Vinton *vs.* Welsh, 9 Pick., 87, was decided on another point. The Court, however, go on to express an obiter opinion as to the question whether an express statute that *all* the owners of dams on the river Monatiquot shall keep a passage for fish open in their dams, is repealed by a subsequent statute incorporating all the proprietors of mills on that river for the purpose of building a reservoir, and hold that it is not. No constitutional question arises at all in the case.

The only other case in Massachusetts, on this subject, is the Essex case, 13 Gray, 239, where this question could not arise, as there were express provisions made in the charters on this subject.

We submit, therefore, that no reservation of power to cause fishways to be built having been made in the original contract, the State has no power to "interpolate such term or condition foreign to the original agreement."

II.

But if in the State of Massachusetts there be a custom, or usage, by which an implied condition is annexed to grants of power to build dams; that the Legislature may at any time require such fishways to be made in them as they think fit; and if the case of Stoughton *vs.* Baker, 4 Mass., 522, is to govern this case, we say, that in the case at bar the State has, by providing in our charter for this very right of fish passage, made another contract, which, upon our accepting it and paying damages, as we have done, exempts us from any further requirement.

It is well settled that this right to have fish pass up and down rivers is a *public* right solely. No owner of land above or below a dam can maintain any action against the builder

of a dam which injures his fishery, nor proceed against the dam as a nuisance, nor is the owner liable to indictment.

Stoughton *vs.* Baker, 4 Mass., 522.
Commonwealth *vs.* Chapin, 5 Peck, 199.
Vinton *vs.* Welsh, 9 Pick, 87.
Commonwealth *vs.* Alger, 7 Cush., 53.
Same *vs.* Essex Co., 13 Gray, 239.

In the last case the Court say on page 249, speaking of the requirement of fish-ways, "This was the only remedy, because no private action would lie for the riparian proprietor, and no indictment at common law for the public injury." And again on page 251—"The Legislature had the power to regulate the public right, and diminish it or release it as the best good of the public on the whole might in their judgment require."

It is like the right to bridge a navigable stream. If the needs of the public require a bridge without a draw, the Legislature may grant it, and no individual whose rights of passage on the stream are affected has any *right* to compensation.

Still the State can, if on the whole it think best, annex to such a grant a requirement that the owners, as a part of the consideration, shall pay a gross sum to the State, or to some definite person or persons, or in general to those who in fact can prove themselves injured by it. As Shaw, C. J., says in the Essex case, page 251, "Towards them (that is the owners of fisheries) the public stood in some respects as trustees, and their beneficial interests could not honorably be disregarded."

If, however, such a provision *is* inserted, it is clear that this additional consideration is paid for the relinquishment on the part of the State of the right to thereafter demand fishways, or payment of any other or further damages than those re-

quired, and a contract to that effect arises by *necessary implication*, as clearly as if it was expressed in terms.

The rules of construction applicable to legislative contracts are not different from those applied in construing agreements between individuals.

"*All* contracts are to be construed to accomplish the *intention of* the parties, and in determining their different provisions a liberal and fair construction will be given to the words, either singly or in connection with the subject matter."

The Binghampton Bridge Case, 3 Wallace, 51, (p. 74).

How extremely unjust and unreasonable it would be, where only an *implied* condition of building a fishway existed, to put in an express condition that all damages should be paid, and then force the plaintiff, by building fishways, to give back to the owners what he had already paid them for the loss of. No court would allow such a construction of a private agreement.

This release of the public right may be made in several ways. A permission in the charter to erect a dam without any fishways is an express waiver. A provision that they shall make fishways of a certain kind is a waiver by implication of a right to require any other kind. A provision that instead of performing this duty, they shall pay damages to certain persons whom the Legislature may consider to be injured, is another implied waiver.

This clearly appears from opinion of Shaw, C. J., in the Essex case, 13 Gray, 239, the principles and course of argument in which are, we submit, conclusive of the present case.

There the Legislature, in the original charter granted to the Essex Co., had provided that a fishway of a certain kind should be made, which turned out to be ineffectual, and the Court say, on p. 250, "Under these circumstances we are strongly inclined to the opinion that the Company had performed the condition on which their charter was granted, and

would be free from public prosecution." And again, on p. 252, speaking of the clause in the amended charter, that the former one should not be a bar to private claims for damages, they add, " implying that but for this clause such provision for fishways would have been a bar to any private claim for damages."

Subsequently the Essex Co. asked the Legislature to enlarge their capital, and an amendment to their charter was granted on condition that they should pay damages to the owners of fishery rights above the dam—a new remedy, " where none existed before," and a " substitution of one onerous duty upon the Company for another, more equitably and effectually *to accomplish the same object.*"

The Company accepted this amendment to the charter and paid these damages, and the Court held that " this enactment had in it all the elements of a contract executed by one party and binding on the other."

After this the Legislature enacted that the Co. should make a sufficient fishway around their dam, which the Co. refused to do—and the Court held that having paid these damages, they were exempted from making any fishways in future, by implication, though there was no *express* exemption in either charter.

It is perfectly clear that if this provision for paying damages had been in the original charter instead of the amended one, the Co. would have been equally exempted. The principle on which the case is decided, that the Legislature have impliedly waived this public right by the provision that the Co. should pay damages, applies whether there had theretofore been another provision or not.

This amended charter of the Essex Co. was passed in 1848, and the charter of the Hadley Falls Co. was passed in the same year and at the same session ;—this provision for paying

damages was "a scheme entirely different from any which had been previously adopted in any similar case," (Shaw, C. J., 13 Gray, 251,) and certainly should be held to have the same effect in each of these two charters. If it was a waiver of this public right in one, it should be also in the other.

The Court below, in their opinion, do not attempt to controvert the principles laid down, or the application of them, made by Judge Shaw in the Essex Case—but endeavor to show that there is a different state of facts in the case at bar. We submit that the only differences on which the Court below rely are entirely immaterial, and can make no change in the application of the principle.

These differences are two, viz:—

1st—That it appears in the present case that there are injuries to fishing rights *below* the dam, for which no compensation has been paid, and it does not appear that any such injuries existed in the Essex case.

It is not found in the case at bar, that any appreciable injuries are caused to any *owners of fishing rights* below the dam. The finding is, that the maintenance of the dam caused a small but appreciable decrease of the shad *in the whole river below the dam*, evidently a slight one in the gross, as it cannot be estimated, still less can the infinitesimal injury to each individual resident on the banks below be estimated.

Moreover, the fact of this small decrease is founded entirely on a *theory* of Mr. Lyman, (p. 13 of case,) and against the opinion of practical fishermen. According to this theory, every dam decreases the number of shad below, because he thinks shad will not spawn anywhere but where they were born. If this is correct, it would follow that the Essex dam must also have decreased the number of shad below it.

But it is not of the slightest importance to the question in

the case, whether in either case there were in fact injuries to fisheries, either above or below, caused by the dam. Even if there were, it was not a taking of private property for which the State was bound to make compensation. It was only such injury as these owners suffered in common with all the rest of the public, by the release of a public right, and such injuries the State is not obliged to pay for.

The Legislature did not provide, in either of these charters, for the payment of damages, because there was any constitutional provision that required it, but because that was the consideration it saw fit to require for the release of the public right to have fishways in the dam. If certain persons injured had been specified by name, and others left out, that would not have affected the existence or obligation of the contract.

2d. The only other difference relied on by the Court below is, that the first charter granted to the Essex Company required a fishway to be built, though it proved to be insufficient.

It is difficult to see the practical difference between building a useless fishway, and having none at all. Neither public nor private rights are benefited in either way. The Court seem to have an idea that the State cannot release this public right unless it stipulates for *some kind* of fishway, but it is not necessary that this fishway shall be good for anything.

But the reasoning of Judge Shaw, in the Essex case, is not founded at all on the existence of this provision in the first charter. It is based solely on the fact that the State, by the last charter, by requiring damages to be paid, *impliedly* released all the rights of the public, (see p. 253, 13 Gray,) and we think nothing can be plainer than that if the first charter of the Essex Co. had been like the second, that is, like ours, Judge Shaw would have followed the same course of reasoning, and came to the same conclusion.

We say, therefore, that both, on the general principles laid down by this Court, and the application of them made by the Supreme Court of Massachusetts, in a similar case, there is here a contract between the State and the plaintiff in error, that the latter shall not be required to make further provision for the passage of fish through or over its dam.

That this is a fair and reasonable construction, follows not only from their principles, but from a consideration of the results to the plaintiff in error, which would follow from any other view of their liability.

This construction does not leave the State without remedy. They may in the exercise of their right of eminent domain take back this right, by paying for it, as in all other similar cases.

III.

But it may be claimed that there is a statute of Massachusetts, existing when this charter was made, which reserves the right to alter, modify, or repeal any charter theretofore granted, and that the State has the power under this statute to take back any right it has given *even* for a valuable consideration. If this construction can be maintained, it disposes completely of the claim in the Constitution in question. All a State has to do is to pass a law saying in substance: In all contracts I may hereafter make I reserve the right to break them if I see fit.

If this be the proper construction of this statute, it is clearly void. A constitutional provision cannot be evaded in such a manner.

But it is evident from the Essex case that no such construction can be given to this statute. On p. 253 the real construction of this statute is laid down, viz:—"Where under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the power granted."

The distinction is this—the Legislature may, under certain circumstances, alter *the charter*, but they cannot do anything to affect or destroy any *rights of property acquired under the charter;* and if under such reservation they attempt to violate any contract they have made, they are met by a higher power than their own, which forbids it.

In Durfee *vs.* Old Colony R. R., 5 Allen, 230, the Court, on p. 244, speaking of the true meaning of this general statute, say: "It is nothing more than the ordinary case of a stipulation that one of the parties to a contract may vary its terms with the assent of the other contracting party."

In Sage *vs.* Dillard, 15 B. Monroe, 340, in a similar case, the Court lay down the same rule, and say, on p. 363: "Indeed, we perceive but little if any utility in a reservation of a power to alter or amend, when it strikes us as axiomatic that the Legislature can impose no alteration or amendment upon the trustees *without their consent*, either with or without the reservation."

From these and other similar authorities it appears to be well settled, that whatever changes this reservation authorizes Legislatures to make in a charter, yet it does not so far overrule the Ctonsitution of the United States as to authorize the passage of any law affecting the obligation of contracts, and

if the Court should hold, as we claim, that in the case at bar a contract existed between the State and the plaintiffs in error, this general statute does not prevent the law in question from being invalid so far as the plaintiffs in error are concerned.

F. CHAMBERLIN,
Counsel of Ptfs. in Error.

HOLYOKE WATER POWER CO.

PLAINTIFFS IN ERROR,

VS.

THEODORE LYMAN AND OTHERS,

Commissioners, &c.,

DEFENDANTS IN ERROR.

BRIEF IN REPLY.

F. CHAMBERLIN,

Counsel for Pltfs. in Error.

THE HOLYOKE WATER POWER COMPANY,

PLAINTIFF IN ERROR,

VS.

THEODORE LYMAN AND OTHERS,
COMMISSIONERS, ETC.,

DEFENDANTS IN ERROR.

Brief (in Reply) of Plaintiff in Error.

The positions mainly relied upon by the defendants in error, are two, viz.:

First:—That no *express* authority was given by the charters to maintain a dam without a fishway, and that the charters contain nothing from which, by a fair construction, a necessary implication arises that the Company was to be exempt from the obligation to maintain a fishway; and

Second:—That if such exemption was originally secured by the charters, the legislature still, under the reserved power to "alter, amend or repeal," may enforce the requirements in controversy.

As to the first claim, in addition to what has been said in our principal brief, we say, that when power and right to build a dam of specified height is specially granted by the legislature to one who owns the soil; and express provisions are inserted in reference to the subject of a fishway or fishing

rights, which are evidently designed to give remedy and impose a burden; whether it be by the payment of damages, or the building of a fishway, the implied reservation of right to require something else and beyond, is fully met.

The legislature *have dealt with the subject matter*, and it is presumed that they said all they intended to say.

The expression of the one provision is the exclusion of al others. The legislature alone had the right to require the building of a fishway, *or* such damages as would be equivalent thereto.

It is absurd to say that any *fair* construction of the grant would justify the commissioners in giving only such damages as would be sustained with the best fishway which could be built; and yet it is clear that the corporation would have been entitled to such diminished estimate if this claim on behalf of the defendants can be sustained.

The rule invoked to aid in the construction of the grant—that public grants are to be construed most strictly against the grantee—is only applicable (at least in Mass.,) when the language is so ambiguous that all other rules fail.

City of Boston *vs.* Richardson, 13 Allen, 156–7.

Here is no ambiguity.

In all other cases, the rule is that stated on page 10 of principal brief: that "all contracts are to be construed to accomplish the intention of the parties, and in determining their different provisions, a liberal construction will be given to the words, either singly or in connection with the subject matter."

3 Wallace, 51, *on p.* 74.

Again we say, that the subsequent recognition of the dam *as built*, and the *express* right to maintain it as it then *stood and had theretofore existed*, conferred by its charter on the present corporation rights which are conclusive against this claim.

When this charter was granted, the dam was completed and had been for a long time.

The charter of the present company was asked for by men who desired to *purchase* the property *as it then existed*, with all its privileges, powers, and vested rights.

They applied to the legislature for power so to do, and it was granted.

They were specially authorized to "purchase, take, receive, and hold, sell, loan, and dispose of; *all* the estate, real, personal, and mixed, with *all* the water power, water privileges, *dams*, canals, rights and appurtenances thereto pertaining or belonging, or therewith connected, or which have at any time heretofore belonged unto or been the property of said Hadley Falls Company.

Charter, Sec. 2. Record, p. 11.

They were expressly "made a corporation for the purpose *of upholding and maintaining* THE *dam*, across the Connecticut River, *heretofore constructed* by the Hadley Falls Company," &c.

Having been granted such power in their charter; and having accepted the charter and acted under it as is set forth in their answer, (Record pp. 7, 8 and 9), it became, and was and is, a contract between the State and said H. W. P. Co.

This 2d charter *expressly* authorizes the upholding and maintaining of the dam without a fishery—*i. e.*, as "*heretofore constructed* by the Hadley Falls Co."

That the enforcement of the legislation resisted, would *alter* the dam thus constructed and *diminish* the power thereby created, is found in the case (set forth in the answer, [Record, p. 8,] and found to be true by the court below.) Record, p. 12, 1st clause.

"That such fish-way must use a certain amount of water power," and "would injure or inconvenience the manufacturer more or less seriously." (Record, p. 8.)

I am aware that the report finds that "the fishway" which the commissioners *now* require the company to build and

maintain, would not diminish its water power *except when they may desire to add to the permanent height of their dam by flash boards.*"

To this then are two answers.

First, That the flash boards, which are put on in the drought of summer and autumn to secure and reserve the full amount of each passing shower, are of great, and as the works which depend upon this power are increasing, of growing importance, and may be of sufficient value in a single year to create a fund, the interest of which would purchase and distribute as many shad and salmon among the people above that dam, as would ever be caught there in the condition and use of the water power, set forth in the finding. (Record, p. 13.)

[Salmon from Maine or California can be sold *fresh* in Hartford or New Haven as cheap as those caught *below* the dam.]

But the corporation believe the fishway *now* called for at an expense of $30,000 or $40,000 to be but the beginning of a *series of experiments*, which is likely to involve a much larger outlay; not only quite disproportionate to the expected benefit, but involving a serious diminution of their power, and peril to the structure of their dam.

The statute of 1869 gives very ample powers, and deputes all the legislative discretion to the commissioners, or *either* of them, and authorizes them to act not only *severally* but each by *deputy*.

The third section provides that "each may personally *or by deputy* enforce all laws regulating inland fisheries, &c."

The fourth is so important that I quote it entire—it provides that "whenever *either* of said commissioners finds that there is *no fish way or an insufficient fish-way* in or around a dam where the law requires a fish-way to be kept and main-

tained, *he* may at *his* discretion enter with workmen and materials upon the premises of the person or corporation required to maintain said fish-way, *or cause one to be constructed where none exists, at the expense of said person or corporation, and may take if necessary the land of any other person or corporation*, not obliged by law to maintain said fish-way, provided compensation shall be rendered to the owner thereof, in the manner provided in relation to land taken for highways, *and said expense shall be a charge against said person or corporation, required by law to construct and maintain such fish-way, to be recovered in an action of contract in the name of the Commonwealth, with cost* and interest at the rate of twelve per cent.; provided that when a fish-way has been constructed *in accordance with the provisions of this section*, said commissioners shall not require the alteration of the same by the owner of the dam, *within five years of the completion of the same.*

It will be readily seen that the case of the plaintiffs resting upon this legislation is one which *may involve the entire property of a water power company like the defendants*, if it is constitutional in itself, and if the company is without such chartered franchises or contracts as exempts it from this *absolute* and unlimited control.

Effective provision for the passage of fish up and down the dam of these defendants—thirty feet high—about one thousand feet long—and with water varying from no depth at all on the crest of the dam, to twelve feet of water is a difficult and expensive matter.

The mode and manner in which it can be done, has not been so determined, that it is at present beyond a theory; and before it is accomplished *to the satisfaction* of *all three* of these commissioners, it may be necessary to build a fishway extending the whole length of the dam or to construct a canal on an inclined plane *around* the dam, of such length as to render the flow of water in it comparatively moderate.

To fully carry out and enforce this legislation, may not improbably so change the status of the corporation, that instead of the ownership of a valuable water power, to be managed under its charter, for the benefit of its stockholders, it will become proprietor of an extensive *fish-pond*, to be improved under the direction of each of the fish commissioners or his deputy, for the benefit of riparian proprietors, who have already *been once paid* for that which is to be restored to them. And these will result not only the impairing of the contracts, contained in the charters of the corporation, but of the contract of *purchase*, between the two corporations *authorized by the legislature*, and of all the contracts relating to water power which the plaintiff corporation has made, in reliance upon the legislative grants, with its grantors and lessees.

But, 2d; The defendant in error claims that if the original grants vested in the corporation the right to maintain the dam, exempt from the burden of a fish way. Still, this legislation is valid and constitutional against this corporation as an "alteration or amendment" of its charter, and they refer as their authority for making such alteration to the provision in the "General Laws" of Massachusetts, which provides that every act of incorporation, passed since the 11th day of March, A. D. 1831, "shall, at all times, be subject to amendment, alteration, or repeal, *at the pleasure* of the legislature." Gen. Stat. of Mass., Ch. 68, Sec. 41.

Much force is attributed by the defendant in error, and by Judge Gray, in the opinion delivered below, to this provision, in the legislature of Massachusetts.

The claim in behalf of the petitioner in error, that it has *no* force in this case.

Principal Brief, pp. 14, 15, and 16.

3 Story on Constitution, Sec. 1377.

Sage *vs.* Dillard, 15 Monroe, 240.

5 Allen, 230 and 244, (both cases referred to on principal brief, p. 15).

Here we claim that under power in a charter, *rights* have been acquired and become *vested* in the Hadley Falls Co., which have subsequently, *and as they then or theretofore existed*, been by the aid and in pursuance of a legislative grant and *contract* with plaintiff in error, and by force of a contract with the said Hadley Falls Co., (authorized by the defendant in error,) purchased by the plaintiff in error, with express stipulation on the part of the State of Massachusetts, that the plaintiff *might uphold and maintain them as they then were*, and *had been*.

Read 1 and 2, Section of Charter and Petition in Error. Record, p. 11, and also other matter at foot of page 11 of record.

* * * * "for the purpose of upholding and maintaining *the* dam across the Connecticut, *heretofore constructed*, by the Hadley Falls Company."

* * * * "purchase, take, *hold*, receive, *sell*, and lease, all and any part of the *estate*, water *power*, water privilege, claims, &c., and appurtenances, thereto pertaining or belonging, or which have at any time heretofore belonged unto or *been* the property of said Hadley Falls Company," &c.

Charter of Plaintiff in Error.

Sec. 2, Record, p. 11.

In reference to the effect to be given to this reservation of power, Judge Gray, in the opinion of the court below, says: "The extent of the power reserved by such an enactment has been the subject of some diversity of Judicial opinion. It is sufficient now to say that it is established by adjudications which we cannot disregard, and the principles of which we fully approve, that it at least reserves to the legislature, the

authority to make any alteration or amendment in the charter granted subject to it, that will not defeat *or substantially impair the object of the grant, or any rights which have vested under it*, and that the legislature may deem necessary to secure either that object or other public or private rights."

If with any possible reference to the fair meaning and proprieties of language, this could be called an *alteration* (which we deny). Still, we should claim that is not *such* an alteration as that reservation contemplated, or as is here defined.

By that reservation the legislature never intended to retain the right to make *unreasonable* changes in a charter, but such a change as is defined by Judge Gray.

The alteration attempted under and authorized by this legislation, is in both particulars named by him, outside of the limitation; it substantially impairs and may defeat the object of the grant; and it annuls rights which have become vested under it.

But we say it is not an alteration at all, as that language and that power are employed and applied in legislative vocabulary.

It is rather a *violation* of our charter, in a part which remained no longer executory merely, but had passed into the nature, and acquired the sacredness of property, and was beyond the reach of any *alteration* which could properly be made in our charter.

Really it is not an act in amendment or alteration of our charter, but *as to us*, it is an act authorizing the taking of private property for uses, in part public and in part private. It would take the property of this corporation and bestow it not alone or entirely (if indeed at all) upon the public, but merely upon the owners of fishing rights, who have already been paid $30,000 for its purchase.

The grounds upon which it is sought to distinguish this case from that of the Essex Company (13 Gray) are quite un-

tenable. The cases are in all essential particulars alike, except as our case is strengthened by the *last* charter.

See Hadley Falls Co. Charter Record, p. 10, and recital of Essex Co. Charter, (13 Gray, 244) Stat. 1848, ch. 295.

In comparing the two cases, it will be unnecessary to consider the liability of the Essex Co. to build a fishway under their original charter, as it is quite evident by reference to the case, that that had no legitimate bearing upon the result.

At the time the additional act was passed in favor of the Essex Company, their dam had been in operation some time with the fishway prescribed, which had proved to be unsuitable or insufficient to accomplish the purpose of providing for the passage of the fish. 13 Gray, 250, 261.

The company then needed and asked for legislative aid to enable them to increase their capital stock.

They were in precisely the same position in all material respects as the Hadley Falls Company, when it needed and asked for a charter.

The one company was asking for a charter, and the other for increased power under a charter already granted. In both cases the legislature has the power to regulate and adjust all conflicting rights whether public or private, connected with, or which would grow out of the granting of the franchise, and they exercised it in both instances in precisely the same manner.

In the one case the *increase of capital was granted*, substituting " for the public right intended to be provided for by the fishway, a provision for the payment of damages by the company *to every riparian owner of fishing rights* along the river *above the dam*, giving them a remedy against the company where none existed before," &c. 13 Gray, 251; and in the other *the original grant of the charter was made* with precisely *the same* arrangement and provision.

In both cases the charter, and the increased capital, were accepted and the conditions imposed by the legislature were performed by the grantees of the franchises.

The indemnity in both cases was equally broad, being a provision for the payment of damages by the company to every riparian proprietor *above the dam*, and in both cases a large amount was paid as such damages, and all parties provided for by the legislature, were paid.

If it be said that in this case it appears, that the fish were somewhat diminished below the dam, the answer is, that for various and quite obvious reasons that cannot properly distinguish this case from the other or vary the result.

(*a.*) The same fact *existed* in the Essex Company's case although not specifically found—perhaps for the reason that it was there, as here, quite immaterial.

(*b.*) The same thing necessarily exists where a fishway in its *best* conditions, takes the place of the broad stream. The passage is *somewhat impeded* as is suggested by the late Chief Justice of the Supreme Judicial Court of Massachusets. 13 Gray, p. 249.

(*c.*) A slight but appreciable diminution is all that is found here and that upon evidence which was "very conflicting" and the finding was based upon the testimony of one of the commissioners; against the testimony of practical men eminently intelligent upon the subject, and against the fact that no riparian proprietor below the dam was ever known to make such claim.

(*d.*) If there was practical damage which could be estimated, the parties who sustain it are the only ones who can avail themselves of that fact, and the proper remedy for them, if they can be convinced that they are damaged and ask relief, is to give them right to prove their damages in some proper manner as those above the dam were permitted to do, and se-

cure compensation, and not compel these defendants to lose the benefit of the large damages they have paid to those above the dam where fisheries were destroyed, and restore to those parties at great expense that for which they have been paid.

(*e.*) Neither of these classes had valid claims for damages except as the legislature should and did provide (13 Gray, 249). The power to regulate the public right and to provide remedy for such private parties as in the judgment of the legislature would be seriously and practically damaged was entirely with the legislature, and they have exercised it. The consideration suggested by the court in the Essex Company's case at page 251 seem quite conclusive.

(*f.*) In addition to the *public* benefits expected from the building up of a large manufacturing town, the legislature may have believed that private riparian owners below the dam would be quite as much benefited by the increased market which they would find for such fish and other products as they would have, as they would be possibly damaged by the diminished number of fish.

The proposition *to take from these defendants* the valuable right which they acquired by the payment of damages to private owners above the dam, and restore to such owners that for which they have been fully paid, is quite as extreme a case as that put by this court in 13 Gray, 253, as an illustration of improper and unconstitutional legislation.

It would probably be admitted that, the damages having been paid, and all things done by this corporation according to the requirements of its charter; it could not now be required *to take down and remove* its dam under a pretence of an alteration of its charter.

But we say, the same principle prevents our being required to materially reduce it.

See principal brief, page 6. (Read it.)

And further, the power conferred extends to its substantial destruction, if it should be necessary.

This is an equity cause—and the inequity of the relief sought by the complaint can hardly be overstated.

The legislature authorized the H. F. Co., upon payment of damages to owners of fishing rights, to build their dam—it is built at vast expense, $2,000,000 is expended in that and its accessories, i. e., in the creation of the water power—That company fails, and the present corporation is authorized, by a legislature which knows all the facts, to "purchase, hold, and *maintain the dam as built*, and to sell—to individual purchasers in good faith and for value—power created thereby, *as it then stood*.

Under this, not only stockholders have subscribed and paid and become holders for value, but the corporation has sold to other outside parties, power—graduated by the height of the dam as it then stood—as is fully set forth in the answer, p. 8 of Record.

Now the legislature proposes to allow any one of three commissioners to take down and destroy, piecemeal and at his own individual discretion, the dam thus *recognized* by them and purchased *as it then stood* and sold in the market under their direction and authority.

Is "the dam," as it then was, "heretofore constructed by the Hadley Falls Co.," a charter; to be altered, amended or repealed? or a "property" acquired under and in pursuance of a charter?

The questions need no answer.

It may be asked, what is the power thus reserved, and what *may* be done by a legislature under it?

Without attempting to give an accurate or well defined answer, it may safely be said, 1st, They may at any time *repeal* a charter.

2d, They probably may make any alteration in a charter or limitation of the power; or provision in reference to the property or vested rights of a corporation; and compel conformity to their requirements, under penalty of forfeiture of the charter.

But the repeal of the charter would still leave the property in the possession of the stockholders and they would own it as tenants in common.

See 13 Gray, 253–4.

If it be claimed that the corporation in accepting its charter, assents to all its provisions, including that authorizing "alterations and amendments," the answer is that this does not at all dispose of the question, how are amendments and alterations to be enforced?

The defendants in error say by decree in equity, specifically compelling compliance with any legislation which is *reasonable* and which does not impair the *property* or defeat the *vested rights* of the corporation.

We say by proposing an amendment for the acceptance of the corporation, and if there be an unreasonable refusal—employing such compulsory force as lies in the repeal of its charter.

An assent beforehand to all and every alteration that one of two contracting parties may make in an agreement, is absurd and impossible.

Assent implies knowledge of that which is assented to.

Further; so long as an act of the Legislature operates merely upon a charter, remaining a charter, and nothing else, it may be possible to stand upon the reserved power to alter.

But if under that charter *a property has been acquired, or rights have become vested*, any act of the Legislature which touches and in any degree impairs that property, is unconstitutional.

The reservation in the charter, (under the bill of rights,) is not of a right to *take property*, and this dam possesses every attribute of property known to any subject of property under the law.

It is necessarily true, that under the charter of *the plaintiff in error*, this corporation did certainly acquire, and pay for, the right as against the proprietors of fishing rights above the dam, and also against the public; to obstruct the ascent of fish, just so far as the dam, *as built and existing at the time the present corporation was chartered and purchased the dam;* did *then* obstruct them.

It is equally certain that this right is a *property*, within the fullest protection of the constitution; it is *the dam* as it then stood.

It has been bought and paid for, and extensive privileges under it have been sold, under the express sanction of the Legislature.

It is equally certain that the act, the validity of which is in question, authorizes such changes from time to time in *the structure of the dam*, as not only diminishes its value, but may substantially destroy it.

If the public interest requires their destruction, then it is the ordinary case of taking private property for public uses, and must be paid for.

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